

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HARGER DA SILVA,

Plaintiff,

v.

NEW YORK CITY TRANSIT
AUTHORITY, et al.,

Defendants.

* * * * *

* Case No. 17-CV-4550 (FB)

*

*

* Brooklyn, New York

* June 4, 2018

*

*

*

*

*

*

*

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

DAVID ALAN ROTH, ESQ.
ELLIOT DOLBY-SHIELDS, ESQ.
Roth & Roth, LLP
192 Lexington Avenue, Suite 802
New York, NY 10016

For the Defendants:

MARK S. YAGERMAN, ESQ.
MARCIA K. RAICUS, ESQ.
Smith Mazure Director Wilkins
Young and Yagerman
111 John Street, 20th Floor
New York, NY 10038

DENISE FURIANO ROZZA, ESQ.
New York City Transit Authority
130 Livingston Street, 11th FL
Brooklyn, NY 11201

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

Fiore Reporting and Transcription Service, Inc.
4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992

1 (Proceedings commenced at 11:59 a.m.)

2 THE COURT: Harger Da Silva versus New York City
3 Transit Authority, 17-CV-4550. Let's start with plaintiff's
4 counsel's appearance.

5 MR. ROTH: David Roth, of Roth and Roth, on behalf
6 of plaintiff, and Elliot Shields, my associate, is here as
7 well.

8 MR. SHIELDS: Good morning, Your Honor.

9 THE COURT: Good morning.

10 And for the defendants.

11 MR. YAGERMAN: Mark Yagerman, Smith Mazure Director
12 Wilkins Young and Yagerman, for the Transit. Marcia Raicus
13 from my office and Denise Rozza from Lawrence Heisler's
14 office, New York City Transit.

15 THE COURT: Okay. All right. Well, let me ask. Any
16 settlement possibilities?

17 MR. YAGERMAN: No, Judge, none.

18 THE COURT: Okay. Not on this one.

19 MR. YAGERMAN: Not on this one, no.

20 THE COURT: Okay. So maybe just addressing things
21 in order. At 41, you had the proposed stipulation of
22 confidentiality that the defendants signed. And then we have
23 at 45, plaintiff's letter. Have you worked this one out at
24 all?

25 MR. YAGERMAN: Could I address that?

1 THE COURT: Yeah.

2 MR. YAGERMAN: Yeah. So we asked for a conference.
3 I spoke with Mr. Roth. Three-fold -- number one. We wanted a
4 confidentiality agreement on documents that are sensitive for
5 security for the Authority. It's the procedure of the
6 Authority. It was document 41 that we submitted.

7 I called Mr. Roth. He indicated to me like about
8 May 8th he'll get me something. I got something this weekend.
9 I went through it briefly and I have a number of concerns with
10 it, but I haven't really vetted that document.

11 The issue is we've provided a great number of
12 documents, Your Honor, just to comply with our practice and to
13 move things along, including track plans, station plans,
14 signal plans, stopping distance charts, all security-sensitive
15 documents.

16 Mr. Roth has been involved in state court involving
17 certain security issues involving documentation and has
18 actually signed the stipulation that's modeled similar to the
19 one that we've presented to him in this case in New York
20 County, after a hearing with New York City Transit Authority's
21 Chief of Security, Higgins.

22 So, you know, in good faith we provided a great
23 number of documents. But we have -- I wanted a proposal in
24 place for that document, those documents, as well as going
25 forward. We have a good number of documents that we're going

1 to be providing as soon as they're vetted, which should be --
2 I don't know -- sometime this week.

3 MS. ROZZA: Hopefully, yeah.

4 MR. YAGERMAN: This week sometime -- which deal
5 with, you know, some -- which deal with the track intrusive
6 devices and platform doors. And that was the (indiscernible)
7 first time. So we wanted a confidentiality agreement.

8 MR. ROTH: Your Honor.

9 MR. YAGERMAN: The sec -- could I just --

10 MR. ROTH: Yeah, but --

11 THE COURT: Please don't interrupt.

12 MR. ROTH: Okay.

13 THE COURT: Go ahead.

14 MR. YAGERMAN: So the second item that we have,
15 Judge, is that we wanted to advise the Court that we are
16 working on getting documents concerning the platform doors and
17 track intrusion devices, which I said are being vetted right
18 now through I believe it's Chief Higgins and Mr. Levine from
19 New York City Transit Authority.

20 And I didn't want the Court to think that we weren't
21 -- that we haven't discussed this with certain decision
22 makers. And I wanted an extension on that just to advise the
23 Court that we're in the process of getting that taken care of.

24 THE COURT: So just looking at what I have --

25 MR. YAGERMAN: We've identified people, Judge, as

1 decision makers --

2 THE COURT: All right.

3 MR. YAGERMAN: -- as part of discovery which the
4 Court wanted us to do, but I wanted to go further and get more
5 -- get documents on that.

6 THE COURT: So are you -- I have at 43, just so I'm
7 following along, your letter or your -- I guess --

8 MR. YAGERMAN: 44 I believe is our letter, Judge.

9 THE COURT: Ms. Raicus' letter --

10 MR. YAGERMAN: Yes, that's correct.

11 THE COURT: -- is at 43. All right.

12 MR. YAGERMAN: Oh, okay.

13 THE COURT: Are you looking for -- I mean, this
14 seems to be your dispute. And then at 44, we have the timing,
15 the letter about the timing.

16 MR. YAGERMAN: Right.

17 THE COURT: So are you asking -- I mean, are --
18 where are you with regard to working out the issues that are
19 in 43?

20 MR. YAGERMAN: Well, I was just presented with a --
21 Mr. Roth's version of a security agreement. I believe it was
22 Saturday morning he emailed it to me.

23 THE COURT: Wait a minute. There's others --
24 there's -- just so we're clear, what I have is 41 is the
25 proposed stipulation of confidentiality, which defendant

1 signed, and it's opposed by the plaintiff at 45 I believe.
2 Right?

3 MR. YAGERMAN: Correct.

4 THE COURT: Then there's what seems to be a letter
5 between counsel, but it's filed with the Court, the 43 letter.
6 Is that right? That the right letter? Yeah. The discovery
7 disputes. And then I have 44, the request for an extension of
8 time which --

9 MR. YAGERMAN: Right.

10 THE COURT: -- some of what you said touched on
11 that.

12 MR. YAGERMAN: Right.

13 THE COURT: So I understand you have the -- it seems
14 like where you are with the back and forth on the
15 confidentiality is you have your draft and you just got
16 something from plaintiff.

17 MR. YAGERMAN: Correct.

18 THE COURT: And you're suggesting that in the state
19 court an order had come out in a similar situation that
20 happened after there had been a hearing. So the
21 confidentiality issue is one?

22 MR. YAGERMAN: Right.

23 THE COURT: The second -- I'm asking are you looking
24 for relief with regard to the document that's filed at 43,
25 which just seems to be a counsel letter? Have you resolved it

1 or is this what you're working on?

2 MR. YAGERMAN: We have a dispute as to demands for
3 discovery, which are, I feel -- some of them and many of them
4 -- blunderbuss and disproportionate to the relative --

5 THE COURT: All right. So these are the issues that
6 you --

7 MR. YAGERMAN: -- discovery issues in this case.

8 THE COURT: -- the issues you raise at 44, right?

9 MR. YAGERMAN: So. I mean, the --

10 THE COURT: All right. Stop with the dramatic
11 sighing. You know, I understand you disagree.

12 But let me just hear from defendant's counsel and
13 then I'll hear from the plaintiff's counsel.

14 All right. So --

15 MR. ROTH: Sorry, Judge.

16 THE COURT: Do you want me -- are you asking for a
17 particular resolution to any of the issues that are in the
18 letter at 43 or are you saying, as you seem to outline in 44,
19 you need more time, but it may be fruitful for you to continue
20 your discussions with plaintiff's counsel?

21 MR. YAGERMAN: I think it would be -- I would hope
22 it could be fruitful to continue with plaintiff's counsel. I
23 just got Saturday morning the confidentiality agreement. I've
24 gotten some letter -- I think it was on Saturday morning as
25 well emailed to me -- on his claims of deficiency of discovery

1 responses.

2 You know, we did this three weeks ago. I thought
3 maybe I would have some sort of productive discussion. I
4 called him twice on it. Yet I got on a Saturday morning, when
5 I'm playing with my grandson, that.

6 THE COURT: Okay.

7 MR. YAGERMAN: In any event, I don't know how
8 productive we would be in discussing line by line some of the
9 discovery demands, Judge. It's possible that you may want us
10 to outline it in a motion and provide a brief.

11 I've given them a -- it's just that it's very
12 disconcerting. I've given them every ascertained document
13 concerning the happening or the occurrence, and ascertained
14 documents that somehow relate to any and all demands, but I
15 can't decipher in my own brain what he's after, and I don't
16 want to be accused of not following through afterwards.

17 THE COURT: Okay.

18 MR. YAGERMAN: I mean, when I get a document demand
19 that asks for produce documents including, but not limited to,
20 complaints, answers, discovery responses, deposition
21 transcript, motion papers, any and all supporting documents
22 supported in connection with motions and trial transcripts
23 from any federal or state lawsuit, or administrative action
24 filed against the defendants by or on behalf of people who
25 were struck by subway trains and cause for the entire period

1 of time for which such records are kept and stored in
2 electronic format, I really don't know how to respond to that.

3 THE COURT: It seems that --

4 MR. YAGERMAN: Truthfully --

5 THE COURT: I mean, your objection's probably less
6 about you don't know what it is and more about it's incredibly
7 burdensome.

8 MR. YAGERMAN: Yes. And you know what, I sleep --

9 THE COURT: I'm sure you can figure it out, but --

10 MR. YAGERMAN: I don't sleep at night when I get
11 stuff like this so that's why I raise it.

12 THE COURT: All right. So it seems to me that so
13 far what we should be discussing is how to resolve this
14 confidentiality issue unless you think you are having a
15 conversation about whatever was presented on Saturday would be
16 helpful.

17 And then we're going to take a break and you can
18 meet. We'll give you a room and you can talk about what your
19 outstanding discovery issues are. And then we'll have a
20 second call.

21 All right. For the plaintiff, what's up with this
22 situation with the confidentiality?

23 MR. ROTH: So, Your Honor, this is -- what happened
24 was, we had signed a confidentiality agreement before we had
25 this hearing with Mr. Higgins who was the head of the MTA

1 Security. And the issue in that case was that they were
2 saying that certain documents -- they had designated we're in
3 agreement. They said okay. We're going to have a hearing and
4 see what should be almost restricted access.

5 And when we had this hearing, I will tell you that I
6 point blank said to Mr. Higgins I said I'm glad you're
7 watching out for us, and I'm not looking to disseminate
8 records that could hurt anybody.

9 And after we had this hearing, I said -- and
10 actually it was very interesting, and I don't want to go on
11 the record about what was a sealed hearing -- everybody was
12 sworn to not disclose what the contents of the hearing was --
13 but other than to say is that it was somewhat eye opening as
14 to what could be security sensitive and what wasn't. And then
15 after that I went back.

16 And during the hearing, I was very uncomfortable
17 with the documents that had been previously released by the
18 Transit Authority to plaintiffs and to contractors. I didn't
19 feel comfortable with that. After speaking to him, I said,
20 you know, I'm in possession of stuff that really now that
21 you've, you know, articulated that that, you know, that should
22 be secure.

23 And I told Mr. Yagerman that we are going to be
24 drafting a document that is not a confidentiality -- because
25 there is no -- there's no trade secrets, there is no

1 confidentiality. This is security-sensitive documents. And
2 so what we did was -- and it took me some time -- I contacted
3 some of my friends who had some cases against NYPD. And, you
4 know, like in Rikers for instance there's cameras and they
5 kind of want to keep those disclosed and I said what language
6 did they use for security-sensitive stuff.

7 So what I came up with was -- and I'm expecting that
8 this will be used just like (indiscernible) -- although he got
9 the title wrong, he wasn't part of that case
10 -- that confidentiality was prior to the hearing.

11 So what we did was we drafted -- and I can hand it
12 up to you, Your Honor --

13 THE COURT: Is this what you sent over on Saturday?

14 MR. ROTH: Yes. Yes.

15 THE COURT: Uh-huh.

16 MR. ROTH: And is it okay for me --

17 THE COURT: No. Well, not yet.

18 MR. ROTH: Okay. So anyways. So we entitled this
19 stipulation and order concerning security-sensitive litigation
20 documents. And that is a far different thing than
21 confidentiality. Because technically public records, they
22 can't be confidential.

23 THE COURT: Well, that's not true. I mean --

24 MR. ROTH: Well, they could be held -- there's no
25 trade secret between -- technically, under FOIL, everything,

1 unless it's security sensitive would be available, like
2 contracts, et cetera.

3 So we drafted -- we drafted with that in mind. And
4 I made the restrictions against the plaintiffs -- and I would
5 expect more restrictive than what they had in there -- that
6 the plaintiffs had certain obligations.

7 But additionally we put in there that if you're
8 going to designate these as security sensitive, then you
9 better be keeping them because I don't want to get them and
10 then be said that oh, you did something wrong.

11 Like they should be having -- they have to make the
12 representation that they're keeping these confidential as
13 well. Because if they're just sending them out to contractors
14 and so, you know, without the same types of agreements, then
15 these documents are out there anyway. And then the security-
16 sensitive litigation documents makes no sense.

17 I mean, if anybody could just get them, it would be
18 like having it up on the internet.

19 So what we put in here is that, hey, listen, we are
20 going to make special steps, even within our own office,
21 within our own server, you know, to protect the records. And
22 the Transit Authority has got to make the same representation.
23 But if they're just giving it out to everybody, then we
24 shouldn't --

25 THE COURT: What is giving it out to everybody?

1 MR. ROTH: In other words, they --

2 THE COURT: I mean, the contractors, presumably
3 those doing work on the physical plant, are going to have to
4 know certain information to do their jobs properly.

5 MR. ROTH: Sure. And they should be signing
6 something as well. Because all I'm saying is if they get it,
7 so what makes it --

8 THE COURT: But then they're in a commercial
9 relationship that --

10 MR. ROTH: -- what makes them less dangerous than
11 me? I mean, you know, I'm saying is I'm signing it.

12 THE COURT: I don't understand this reasoning.
13 Because the -- I mean, once the contractor -- depending on the
14 topic and how the issue, whatever the subject matter of the
15 work, I mean, they then become in a contractual relationship
16 in which they have contractual obligations both, you know,
17 explicit and good faith in their dealings with the Transit
18 Authority.

19 So, you know, depending on how materials are
20 provided to someone doing work for you, they don't become your
21 material so they're not -- you're not free to send them out.
22 I mean, there's a lot of --

23 MR. ROTH: But this is terrorism issues, not -- this
24 was all regarding terrorism.

25 THE COURT: Right.

1 MR. ROTH: This is not, you know, that. So all I
2 said was --

3 THE COURT: Well, I'm responding to your example --

4 MR. ROTH: Okay.

5 THE COURT: -- that the suggestion that because
6 materials are being disseminated to third parties, and non-
7 parties in this action, that that suggests that there should
8 -- you know, there necessarily is some sort of parallel
9 document on the Transit Authority, you know, on the city's
10 side.

11 MR. ROTH: I guess maybe --

12 THE COURT: The Transit Authority side.

13 MR. ROTH: -- maybe the way they get it, like for
14 instance, if you can just download it the station plan and
15 anybody could do it, but I don't know that information.

16 THE COURT: All right. I mean, that's different
17 than a contractor.

18 MR. ROTH: Yeah.

19 THE COURT: Okay. Go ahead.

20 MR. ROTH: Well, you know --

21 THE COURT: All right. So your suggestion is that
22 you've drafted an appropriate security-sensitive
23 confidentiality agreement that you would like the defendant's
24 counsel to consider, but you only sent that on Saturday?

25 MR. ROTH: But it's exactly the same except for the

1 points that I made. Like we looked at it. We compared it.
2 So the points are --

3 THE COURT: So what --

4 MR. ROTH: -- that it's more stringent against
5 plaintiff. And also it takes out this stuff about lecturing
6 to the bar. It says you're not allowed to give to anybody --

7 THE COURT: Yeah. I thought that was a little bit
8 strange. I don't know what that's about.

9 MR. ROTH: Yeah. Well, it's directed against me
10 because I lectured. So, you know.

11 THE COURT: I know. I mean, I figured that out.

12 MR. ROTH: But what I'm hoping --

13 THE COURT: I don't know why you thought it was okay
14 to put it in there.

15 MR. ROTH: Your Honor, what I would say is I
16 suggested it to Mr. Yagerman.

17 And I even suggested it, you know, that I'm hoping
18 that we craft something that can be used universally
19 throughout all of these, you know, all cases where that they
20 were -- where if there's -- if they're designating something
21 security sensitive that they'll be protected. That's all.

22 THE COURT: All right.

23 MR. ROTH: And like I said, it was more -- this is
24 actually more restrictive against me than the other ones.

25 And the only thing -- and the other issue is that to

1 the extent that I have other litigation against the Transit
2 Authority, I should not be precluded from using these
3 documents because they're security sensitive. They know it.
4 I know it.

5 And if I have them, why should I be stopped from
6 using them because they're -- technically the only basis for
7 the confidentiality is the security issue?

8 THE COURT: You know, that begs a different --
9 that's a different -- I understand your point that the
10 security issue would have been expanded to include you, but
11 there's -- in all these -- in all litigation with repeat
12 players, there's a concern about information from one case
13 being used in another if it's not public information.

14 All right. So my take -- so far what I hear is that
15 you all have not had a direct conversation about this proposed
16 model?

17 MR. YAGERMAN: Correct, Judge. Correct, Your Honor.

18 THE COURT: Okay.

19 MR. YAGERMAN: Unfortunately.

20 THE COURT: And then let me get back to plaintiff in
21 terms of the outstanding discovery issues. Some or all that
22 were described in the Smith Mazure letter of May 8th, and then
23 referred to in the subsequent letter --

24 MR. ROTH: Your Honor, I didn't have the --

25 THE COURT: -- your general position?

1 MR. ROTH: My general position is that the -- and
2 the only reason I objected to anything was that we're supposed
3 to meet and confer before we make a motion whether to let a
4 motion -- and I was not given the opportunity to meet and
5 confer on it.

6 So what I -- so right this second, there's their
7 response has -- and many, many, many different objections for
8 the same exact document.

9 Now it may be that the only issue is a security
10 agreement, which we're going to -- I assume we're going to
11 work it out in the next couple of days -- and that once they
12 get that, then they're going to be sending me certain
13 documentation.

14 I don't agree that a whole bunch of these things
15 that they're saying are security sensitive are. But what's
16 the difference if we're going to sign the document anyway?
17 They're just going to give it to us.

18 And then if I want to fight about it, there's a
19 provision that, hey, I can fight. I'm not going to waste my
20 time saying that this is not security sensitive, you know.

21 So my thought process, what would make the most
22 sense is, before I object or say anything, I think that we
23 should work out the security agreement, have it executed, have
24 them produce by Bates stamp what-- you know, if there's a
25 response that these Bates stamp ranges go with the responses,

1 and then we can have -- we could sit down and have a meet and
2 confer, which is what I would normally do, over the discovery
3 issues.

4 What I would say to you is that what the delay was
5 is I had sent a letter. And we had agreed that all responses
6 wouldn't be Bates stamped. This document that was not Bates
7 stamped --

8 THE COURT: Would not be Bates stamped?

9 MR. ROTH: It was not Bates stamped. Okay. So what
10 document it was --

11 THE COURT: All right. I'm sorry. You had agreed
12 that all documents would --

13 MR. ROTH: Yes. In front of Judge Pollak, we said
14 that all documentation --

15 THE COURT: Oh, the old conference.

16 THE COURT: -- be Bates stamped. Ours -- they have
17 now started Bates stamping theirs.

18 But what happened was on May 8th they sent us a
19 letter. So here it says request No. 3, request No. 5, request
20 No. 10.

21 THE COURT: Right.

22 MR. ROTH: With no Bates ranges, I couldn't figure
23 out -- I couldn't figure out what's what. So I said -- you
24 know, I'm like, hey, you've got to give me the Bates range.

25 But in any event, the issues that I'm having right

1 now are that I'm not sure what's responsive to what. Okay?

2 THE COURT: Mm-hmm.

3 MR. ROTH: So what I would respectfully request is
4 that for the purposes of this litigation, when there's a
5 response that the Transit Authority says this request number,
6 if they're going to say this document's responsive, just give
7 me the Bates range so we can have an intelligent conversation.
8 I shouldn't have to try to figure it out.

9 The other issue is -- and this is relating to -- I'm
10 sure that the defendants have given me the documents that they
11 say are related to it, but in request No. 23, it says -- on
12 May 8th it says additional photographs. There are no
13 additional photographs in this package. So I am --

14 THE COURT: Okay.

15 MR. ROTH: So that would be related to the incident.
16 And I have contacted -- they served a notice of my client's
17 deposition. They served a notice of the non-party witness,
18 her boyfriend's deposition. We can -- you know, we can get
19 together and get ready to produce them.

20 I don't think that there's any more documentation
21 that they're going to have that would affect that other than
22 these photographs, if there are additional photographs, I
23 don't know.

24 So my suggestion would be is that, you know, I would
25 like to work together with defendants to figure out what our

1 disputes actually are.

2 And then -- so if we do this confidentiality or
3 security agreement, then they're going to --

4 You're going to produce documents once that's
5 signed, right? You're ready to produce some documents?

6 MR. YAGERMAN: We produced over 200 --

7 THE COURT: All right. Like I said, I get it.
8 Basically, you all need to talk.

9 MR. ROTH: Right. But I need --

10 THE COURT: So my question is, what does this --
11 what does this do to your time line?

12 MR. ROTH: Well, the only thing I would say is that
13 once -- from my time line, as far as the immunity stuff goes,
14 I was supposed to serve interrogatories. They had asked for
15 an extension.

16 I'm going to serve my interrogatories after I get
17 their immunity Rule 26 disclosure. So I only need an
18 extension for that.

19 If they would have called me and said, listen, would
20 consent to an extension for us to get the immunity documents,
21 I would have said yes. Why wouldn't I?

22 And I said that to them initially. I thought this
23 was going to be -- you know, if they're going to stick with
24 their immunity defenses, that there's going to be a heavy
25 discovery burden to support those defenses.

1 And that I understood that and I would be
2 cooperative in giving in extensions. But, you know, nobody
3 ever said to me would you consent? I would consent.

4 THE COURT: Okay. So from the -- two things.

5 One, you need to talk about the confidentiality
6 issue and you need to talk about these outstanding discovery
7 issues. And your option is to do it here or to set a time
8 where you're going to meet and confer in person about these
9 issues in the next couple of days.

10 And then I guess this really goes to the defendants,
11 what time line are you proposing for the extension, given that
12 you need to have this -- these conversations?

13 MR. YAGERMAN: I'd say two weeks, Judge.

14 THE COURT: All right. So it's two weeks extending
15 what your dates to respond, is that what it is?

16 MR. YAGERMAN: For the immunity documents?

17 THE COURT: Mm-hmm.

18 MR. YAGERMAN: Yes, Judge. I would --

19 THE COURT: Okay. All right. So do you want to
20 have your own conversation off the record here or do you want
21 to set a time where you're going to meet, say sometime later
22 this week? It's up to you.

23 MR. ROTH: As far as the security document goes?

24 THE COURT: Mm-hmm.

25 MR. ROTH: I don't know if you do --

1 MR. YAGERMAN: I have to have it voted.

2 MR. ROTH: That's what -- yeah, that's what -- yeah,
3 that's what that. I think --

4 THE COURT: All right.

5 MR. ROTH: -- quite frankly, even though I'd be
6 willing to do it, I know that they've got to talk upstairs. I
7 mean, I know that's the way it goes.

8 But the other thing I would say, Your Honor, is that
9 as far as the document responses to our discovery requests,
10 once we sign the document and then they respond to whatever it
11 is, then we would be able to have a meet and confer.

12 Because they may be -- I may be thinking that
13 they're holding back documents on one privilege and they're
14 just waiting to give it to me because it was -- they
15 cooperated.

16 So that's why I'm saying is that the ones I see what
17 they give me, then I could have a meaningful meet and confer
18 on whatever's outstanding or I believe is outstanding.

19 And just to let you know, for the actual question
20 that he gave to you, I responded in my letter, which I told
21 him I did not expect him to respond to by today because it was
22 done over the weekend.

23 But then I said, well, if you're tracking these
24 cases by like man under cases, could you at least give me a
25 list. That was it.

1 MR. YAGERMAN: What's the -- respectfully, Judge, I
2 don't see the particular relevance or the proportionality.
3 The Transit Authority is not claiming that --

4 MR. ROTH: That's a different story.

5 MR. YAGERMAN: Please, counsel.

6 We're not claiming that people don't come in contact
7 with subway trains. If it's a notice issue, I don't
8 understand the demand for us -- and I think your initial
9 reaction was correct -- it's going back through the history of
10 time on person hit by train cases.

11 What's the particular relevance of that and its
12 proportionality to this particular litigation?

13 THE COURT: All right. So you need to have a
14 conversation about this. I want you to stagger it, given what
15 you've said, because it seems that you should have -- whether
16 you do it today or another day -- a meet and confer about
17 confidentiality. And get that. Then obviously get the
18 documents produced.

19 And then if you can't come to an immediate agreement
20 as to what else needs to be produced, you should meet in
21 person and talk about it.

22 My immediate understanding of this is this goes to
23 the breadth of the case and the exact terms of your defense.

24 Because plaintiff's theory --- which I have
25 questions, because of the enormous capital expense that seems

1 to be involved -- is, you know, much like what -- the Air
2 Trains around. You know, there should be some sort of
3 barrier. I mean, we've already had the conversation.

4 Are we talking about doors, are we talking about
5 some sort of fourfoot high bar, are we talking about something
6 like what's over at, you know, the shuttle at Times Square,
7 and to Grand Central?

8 You know, what is it that would be the bare minimum
9 that would satisfy the plaintiffs and think that there wasn't
10 available here. Right.

11 That's their overall theory about, you know, that
12 it's not -- you know there's a risk and there should be some
13 sort of barrier or some way to stop people from going on the
14 tracks.

15 Then there's the point that you're raising. I mean,
16 there's all kinds of ways people end up on the tracks. People
17 jump on the tracks. People go down to get their iPhones on
18 the tracks. People fall on the tracks.

19 So, you know, would it really -- would the barrier
20 that might have prevented the injury here that plaintiff is
21 complaining of, you know, does that have anything to do with
22 all of the different kinds of cases that I'm sure you have in
23 your records?

24 And then there's the substantive procedural, less,
25 you know, practical question, not substantive, what's

1 involved? If you have a, you know -- I think it was -- what
2 was it called man under --

3 MR. YAGERMAN: Right.

4 THE COURT: -- if you have, you know, a -- you hit a
5 button and summarize the files, well, then that's not
6 burdensome.

7 But if you have to go and pull, you know, documents
8 from archives for, you know, five to ten to 15 years, and
9 that's a massive project, and you are particularly looking to
10 hone in your immunity defenses, then maybe it doesn't need to
11 ever be done or doesn't need to be done now.

12 But I -- you know, there's too many moving parts
13 that are not clearly set forth before me for me to make any
14 determination about this. So I think you all need to, you
15 know, go through this.

16 But you -- you know, from our last discussions, you
17 have a gaping divide as to the like working viability of the
18 theory.

19 But just, you know, to recap, the other issue was
20 what exactly is your immunity defense? Because I think I
21 asked some questions -- and as plaintiff's counsel argued --
22 if yours rests on any analysis of reasonableness, then
23 plaintiff's view, I think, would be that all of this
24 information might be fair game.

25 You know, because it would be a fact -- I mean, from

1 plaintiff's view, it would be a factual determination for the
2 fact finder, presumably the jury.

3 So, you know, there were moving pieces. Last time
4 there was a -- this is not a criticism because it was the sort
5 of state of affairs -- but, you know, a lack of clarity as to
6 exactly what was going to be argued and then what exactly
7 needed to be turned over. So it seems like that still needs
8 to be developed here.

9 So the way to do that seems to be that you would
10 figure out the confidentiality, see what it is that you
11 understand you should produce, have a discussion about what
12 exactly plaintiff is looking for, and what your exact defense
13 is, and for you all (indiscernible) information about what
14 would be involved?

15 I mean, their -- you know, the suggestion or, you
16 know, comparison to security sensitive cases with the NYPD,
17 some of the NYPD's records are very easy to access. They're
18 completely computerized and it's reasonable for them to be
19 produced. And others require, you know, digging out boxes,
20 which, you know, given the scope of the issues raised, doesn't
21 make sense.

22 So I think you all need to have some more
23 conversation with each other about what this is about.

24 MR. YAGERMAN: Quite frankly, I didn't understand
25 many of the demands made. And I can't really -- I can't make

1 it out, Judge.

2 THE COURT: Well, I'm here, but I shouldn't be the
3 first person who anyone's having this conversation with. So
4 let's just set a time frame for doing this.

5 On the confidentiality, can you work it out in the
6 next two weeks? Or at least come back to me with whatever the
7 outstanding issues are?

8 MR. YAGERMAN: Okay.

9 THE COURT: So today is the 4th. Can you have
10 either the agreed upon document or a letter highlighting
11 whatever it is that you disagree with by the 18th?

12 MR. YAGERMAN: Sure.

13 THE COURT: All right. A letter as to issues.

14 And then by when -- how long is it going to take you
15 to have a discussion about the discovery, and then review
16 whatever it is that the defendants are going to produce, and
17 then, you know, focus your issues?

18 I will point out I think we had on the calendar an
19 August 8th conference. I think that's still on there. So if
20 we were working backwards, and assuming that that was when we
21 would discuss the issues, when could you -- I would like some
22 time ahead of that.

23 So we had the 8th. Yeah, it's on for 3 o'clock on
24 the 8th. So by the 25th or the 27th of July, can you get a
25 handle on whatever your outstanding discovery issues are and

1 let me know in a joint letter?

2 MR. YAGERMAN: Sure. July?

3 THE COURT: Okay. I'll say the 27th.

4 MR. ROTH: The 27th?

5 THE COURT: Mm-hmm. July 27th, 2-7.

6 MR. ROTH: For a joint letter to the Court?

7 THE COURT: Yeah. As to outstanding discovery.
8 Okay. Other issues?

9 MR. ROTH: Your Honor, I don't -- I think that
10 whatever other -- whatever discovery issues -- assuming we
11 come to an agreement on the confidentiality or we don't and
12 then you'll rule on it either way, would --

13 THE COURT: Well, that -- that though, yeah, that's
14 going to be that earlier letter because --

15 MR. ROTH: Right. So -- right.

16 THE COURT: -- we can't hang this whole thing up.

17 MR. ROTH: So at that point, then the Transit's
18 going to produce certain documents that had been held back.

19 And just to let the Court know -- and I told this to
20 Mr. Yagerman -- even though there had been no confidentiality
21 on those records, I've been treating them as confidential.

22 THE COURT: Okay.

23 MR. ROTH: Especially after our hearing, I was very
24 careful about that.

25 THE COURT: Okay.

1 MR. ROTH: They're actually not even in my office.
2 So I'm taking that very seriously. We have tons of plans.

3 THE COURT: They're not even in your office --

4 MR. ROTH: No. They're in my house.

5 THE COURT: -- but they're in a secure location?

6 MR. ROTH: No.

7 THE COURT: Okay.

8 MR. ROTH: Nobody's going to my house, but anyway--
9 so what I was going to say is that once -- we're not going to
10 know exactly where we're at until they produce those records
11 that are being held back for the security issue and then we'll
12 know.

13 MR. YAGERMAN: I might say, there has been no
14 documents held back regarding this accident, the facts of this
15 accident, plans, all of that plaintiff has.

16 I'm talking about the blunderbuss document demands
17 that he's made, email accounts, maintenance issues. The woman
18 fainted. He's asking for inspection of the station for three
19 years prior and -- I mean, there's stuff that --

20 THE COURT: I mean, the other way to handle this --
21 and this really goes to you fine tuning what the arguments are
22 that are being made here -- is to come to an agreement. I
23 don't think anyone disagrees that there was no barrier.

24 MR. YAGERMAN: Right.

25 THE COURT: And that seems to be the heart of your

1 claim, that she -- people faint, people fall, people get sick,
2 people get slip, they trip. You shouldn't be able to fall on
3 the tracks.

4 And then the other side of it is in the industry,
5 this is, you know, standard design. Obviously, plaintiff is
6 disagreeing with this.

7 But given all of your considerations that you want
8 to raise, mostly the enormous capital input that would be
9 required to retrofit these stations, that that is not the
10 industry or other whatever standard you're going to propose --

11 MR. YAGERMAN: That's not --

12 THE COURT: -- is the appropriate standard, you
13 know, standard, you know, standard of care in these
14 circumstances.

15 But I mean --

16 MR. ROTH: Your Honor, can --

17 THE COURT: I mean, I don't know if you need --

18 MR. YAGERMAN: Which is also a --

19 THE COURT: I don't know if you need, but you should
20 --

21 MR. YAGERMAN: -- quasi-duty kind of immunity issue.

22 THE COURT: Okay. So that's fine.

23 You have to -- in order to make these exchanges
24 productive, I think you both need to state more clearly and
25 more finely-tuned your exact arguments. But maybe you don't

1 need all of this because I don't know that you disagree about
2 some of these key issues. There's no barrier there.

3 MR. YAGERMAN: Correct.

4 THE COURT: That's it.

5 MR. YAGERMAN: Correct.

6 THE COURT: So maintenance records for the last
7 three years, what's that going to tell you?

8 MR. ROTH: To the extent --

9 THE COURT: I don't know. What could it possibly
10 tell you?

11 MR. ROTH: Your Honor, essentially I -- we could
12 work -- we can work those things out I think.

13 THE COURT: Yeah. All right.

14 MR. ROTH: But what I was going to say is I just
15 would like to bring up one thing. You keep talking about the
16 accountable and the budgetary issue. One of their responses
17 was they don't have to provide that information. And that's --
18 -- I mean, if that's their defense --

19 THE COURT: But this is -- so like you really --

20 MR. ROTH: You know what I'm saying, it's what can
21 we do?

22 THE COURT: You really have to have the
23 conversation.

24 MR. ROTH: Right.

25 THE COURT: And this is why I keep saying it matters

1 what your defense is, you know. If you're --

2 MR. ROTH: Right. We'll talk. Your Honor, I
3 promise we'll talk. Let's leave it at that. Whether we agree
4 or not, we'll talk.

5 THE COURT: I'm introducing it based on, you know,
6 reading the *Times*, talking about how much work there is to be
7 done on the system, and, you know, their fancy diagram about,
8 you know, how slowing the trains down, you know, has a knock
9 on effect. You know. I don't know. I'm sure you all saw
10 that a week or two ago.

11 MR. ROTH: Yeah.

12 THE COURT: You know, that very clever design. Oh,
13 I get it. I don't know what is important to running the
14 trains except, you know, as somebody living in the city.

15 But for you, you have to decide what exactly the
16 issues are that you want to raise on this earlier motion about
17 the immunities and then go from there as to what discovery is
18 relevant.

19 All right. So just for the record, 41 is denied.
20 This is the confidentiality. It was denied without prejudice.

21 And as discussed, you're going to try to work it
22 out. And if you can't, you'll raise it in the letter with
23 whatever your outstanding issues. And the extension is granted
24 as we discussed.

25 So this is all going to, you know, fall in together

1 once you get that confidentiality --

2 MR. ROTH: Your Honor --

3 THE COURT: -- and you have the other situations.

4 And we're going to meet again in August on the 8th at 3
5 o'clock.

6 Yeah.

7 MR. ROTH: And just my -- the only other thing in
8 the order was that my time to serve interrogatories regarding
9 the immunity defense would be after they serve their initial
10 disclosures regarding immunity --

11 THE COURT: Yeah.

12 MR. ROTH: -- would be extended by two weeks, is
13 that all right?

14 THE COURT: That's fine. Is that --

15 MR. ROTH: Is that okay?

16 MR. YAGERMAN: Depending upon --

17 THE COURT: I mean, that's it. You have to. You
18 have to stagger these things.

19 MR. YAGERMAN: Yes.

20 MR. ROTH: Right.

21 THE COURT: Otherwise, how can they know?

22 MR. YAGERMAN: Your Honor, so --

23 MR. ROTH: Make it two weeks from -- make it two
24 weeks from when it's executed. And this way, if we have a
25 dispute, then she'll decide the two weeks from then.

1 MR. YAGERMAN: At least, yes.

2 THE COURT: Well, you should be prepared to turn --
3 all right. Why don't you see what the issues are.

4 But the expectation would be you're working towards
5 an agreement. Then they're going to -- you're going to -- the
6 defendants are going to turn over documents quickly.

7 Then you're going to know. And I had said, you
8 know, maybe before you leave you talk about what your -- what
9 you understand your respective arguments are.

10 I mean, I'm trying to summarize them from memory
11 from our previous discussions. If I've missed something, you
12 know, maybe you should clarify it for each other.

13 All right. This is the schedule. But let me just
14 -- the deputy just drew something to my attention with regard
15 to the 8th.

16 (Pause.)

17 THE COURT: So the 8th actually doesn't look like
18 it's going to work anymore. So let me adjust these dates.
19 How does the 14th of August look for you all?

20 MR. YAGERMAN: I'm sorry?

21 THE COURT: We can go earlier if you want.

22 MS. ROZZA: 8/14 is not good for me, Your Honor.

23 THE COURT: How does Friday, the 3rd, look?

24 MR. YAGERMAN: Friday the 3rd of?

25 THE COURT: August. I'm sorry. Yeah. The 3rd.

1 Yeah. Sorry.

2 (Pause.)

3 THE COURT: How about July 25th? But you're going
4 to have to get me your joint status letter earlier.

5 MR. YAGERMAN: Okay. So now I've got nine dates.
6 Which date, Judge, do we have?

7 THE COURT: I'm just suggesting a couple of days.

8 July 25th, August 3rd, and then I was also
9 suggesting a week -- the week of the 13th, but then somebody
10 said they were on vacation. So takers? otherwise I'm picking
11 something.

12 MR. YAGERMAN: July 25th is fine.

13 MS. ROZZA: Yeah.

14 MR. ROTH: Your Honor, can I make a quick phone
15 call?

16 THE COURT: Sure. Hang on, do you want the 24th?

17 MR. ROTH: I don't know. I don't know.

18 THE COURT: Okay.

19 MR. ROTH: My daughter's in -- I don't think --
20 somewhere I've got to -- it's like I'm supposed to do
21 something that weekend. Let me just make a quick phone call.

22 THE COURT: All right. You can step out if you
23 want. It's up to you.

24 MR. ROTH: Okay.

25 (Pause.)

1 MR. ROTH: The boss says the 25th's okay.

2 THE COURT: All right. The 25th. All right. All
3 right. So then that joint letter, can you have it in by the
4 23rd?

5 MR. YAGERMAN: By July 23rd?

6 THE COURT: All right. 3 o'clock still okay?

7 MR. YAGERMAN: Yes, Judge.

8 MS. ROZZA: Yes. Yes. 3 o'clock.

9 THE COURT: Okay. 8/8 is off.

10 All right. Is there anything else?

11 MR. ROTH: Not from us. Not from plaintiff, Your
12 Honor.

13 THE COURT: Okay.

14 MR. YAGERMAN: No, Judge.

15 THE COURT: All right. Thanks.

16 MR. ROTH: Thank you, Judge.

17 MR. YAGERMAN: If we could get got proper
18 authorizations for medical records. Everything's gotten
19 bounced.

20 THE COURT: All right. Why don't you --

21 MR. ROTH: When is that being --

22 THE COURT: Why don't you talk about that before you
23 all leave. That seems like something you could come to an
24 agreement about.

25 (Proceedings concluded at 12:44 p.m.)

1 I, CHRISTINE FIORE, Certified Electronic Court
2 Reporter and Transcriber and court-approved transcriber,
3 certify that the foregoing is a correct transcript from the
4 official electronic sound recording of the proceedings in the
5 above-entitled matter.

6
7 

8 June 15, 2018

9 Christine Fiore, CERT